

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HARVEY PRESTON,

Petitioner,

Case Number 2:22-cv-10129
HONORABLE DENISE PAGE HOOD

v.

MIKE BURGESS,

Respondent.

**OPINION AND ORDER TRANSFERRING THE CASE TO THE COURT
OF APPEALS FOR THE SIXTH CIRCUIT PURSUANT TO 28 U.S.C. §
2244(b)(3)(A)**

Harvey Preston, (“Petitioner”), confined at the Oaks Correctional Facility in Manistee, Michigan, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction out of the Oakland County Circuit Court for carjacking, Mich. Comp. Laws § 750.529a, unarmed robbery, Mich. Comp. Laws § 750.530, first-degree home invasion, Mich. Comp. Laws § 750.110a(2), and two counts of second-degree criminal sexual conduct, Mich. Comp. Laws § 750.520c(1)(c).

Because the Court concludes that the present petition constitutes a “second or successive petition” within the meaning of 28 U.S.C. §

2244(b)(3)(A), the Court will transfer the matter to the Court of Appeals for the Sixth Circuit so that petitioner may seek permission to proceed.

I. Background

Petitioner was convicted following a jury trial in the Oakland County Circuit Court. Petitioner's conviction was affirmed on appeal. *People v. Preston*, 2012 WL 5853223, No.298796 (Mich. Ct. App. Oct. 30, 2012); *lv. den.* 493 Mich. 969 (April 29, 2013).

Petitioner then filed his first federal habeas corpus petition in this court, which was denied on the merits. *Preston v. Gidley*, 2017 WL 4572336; No.14- 10606 (E.D. Mich. Oct. 12, 2017). The Sixth Circuit thereafter denied a certificate of appealability. *Preston v. Smith*, No. 17-2389 (6th Cir. April 25, 2018). Petitioner has been denied permission by the Sixth Circuit four times to file a successive federal habeas petition. *In re Preston*, No. 18-1847 (6th Cir. Nov. 26, 2018); *In Re Preston*, No. 20-1641 (6th Cir. Dec. 8, 2020); *In Re Preston*, No. 21-1071 (6th Cir. May 12, 2021); *In Re Preston*, No. 21-2620 (6th Cir. Sep. 23, 2021).

II. Discussion

Petitioner already has filed a prior petition for a writ of habeas corpus challenging his conviction.

An individual seeking to file a second or successive habeas petition must first ask the appropriate court of appeals for an order authorizing the district court to consider the petition. See 28 U.S.C. § 2244(b)(3)(A); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998). Congress has vested in the court of appeals a screening function that the district court would have performed otherwise. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). Under the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal district court does not have jurisdiction to entertain a successive post-conviction motion or petition for a writ of habeas corpus in the absence of an order from the court of appeals authorizing the filing of such a successive motion or petition. See *Ferrazza v. Tessmer*, 36 F. Supp. 2d 965, 971 (E.D. Mich. 1999). When a habeas petitioner files a second or successive petition for habeas corpus relief in the district court without preauthorization from the court of appeals, the district court must transfer the document to the court of appeals. See 28 U.S.C. § 1631 (directing that “[w]hen a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action ... to any other such court in which the action ... could have been brought at the time it was filed”); *In re Sims*, 111 F.3d 45, 47 (6th Cir.1997)(holding that “when a prisoner has

sought § 2244(b)(3) permission from the district court, or when a second or successive petition for habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631.”).

Petitioner has previously filed a habeas petition with the federal court challenging his conviction out of the Oakland County Circuit Court, which was denied on the merits. Petitioner cannot proceed with the issues raised in the present petition without first obtaining permission to file a second or successive habeas petition from the court of appeals.

Accordingly, the Clerk of Court is ordered to transfer the habeas petition to the United States Court of Appeals for the Sixth Circuit pursuant to *Sims* and 28 U.S.C. § 1631. See *Galka v. Caruso*, 599 F. Supp. 2d 854, 857 (E.D. Mich. 2009). Because this appears to be a second or successive habeas petition, it would be error for this Court to dismiss the petition as being time barred, rather than transfer it to the Sixth Circuit, because such a timeliness inquiry would be premature prior to any determination by the Sixth Circuit whether petitioner should be given authorization pursuant to 28 U.S.C. § 2244(b)(3)(A) to file a successive habeas petition. See *In Re McDonald*, 514 F.3d 539, 543-44 (6th Cir. 2008).

III. ORDER

Accordingly, it is **ORDERED** that the Clerk shall transfer the petition to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

s/Denise Page Hood
DENISE PAGE HOOD
Chief Judge, United States District Court

Dated: February 3, 2022